

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

AUG 30 2012

ESTATE OF ELLA M. FULTON, DECEASED
by and through LEON FULTON, Individually
and as the Administrator of the ESTATE OF
ELLA M. FULTON, for the use and benefit of
the Heirs

DAVID CREWS, CLERK
By BT Houston Deputy

PLAINTIFF

v.

CIVIL ACTION NO. 1:12 CV 187-A-S

AURORA HEALTH & REHABILITATION
(f/k/a Aurora Australis Lodge, LLC) and
JOHN DOES 1-5

DEFENDANTS

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, Aurora Australis, LLC d/b/a Aurora Health & Rehabilitation ("Aurora") files this Notice of Removal of the civil action styled *Estate of Ella M. Fulton, Deceased by and through Leon Fulton, Individually and as the Administrator of the Estate of Ella M. Fulton, for the use and benefit of the Heirs vs. Aurora Health & Rehabilitation (f/k/a Aurora Australis Lodge, LLC) and John Does 1-5*; Civil Action No. 2012-0111-CV1C, from the Circuit Court of Lowndes County, Mississippi, to the United States District Court for the Northern District of Mississippi, Eastern Division. In support of this Notice, Aurora states the following:

1. Plaintiff filed this action on July 16, 2012. The lawsuit arises out of the care and treatment provided to Ella M. Fulton while a nursing home resident at Aurora in Columbus, Mississippi. According to the Complaint, Fulton suffered injuries and ultimately died as a result of Aurora's negligence.

2. In the Complaint, Plaintiff asserts claims of negligence and breach of contract against Aurora. Plaintiff also asserts claims based on vicarious liability for the actions of Aurora's employees, agents, and/or servants.

3. Aurora was served with a copy of the Complaint and Summons on August 2, 2012. This Notice of Removal is therefore timely pursuant to 28 U.S.C. § 1446(b).

4. Venue is proper in the United States District Court for the Northern District of Mississippi, Eastern Division, because that is the district in which the state court action was filed. *See* 28 U.S.C. §§ 1446(a), 104(a)(1).

5. Pursuant to 28 U.S.C. 1446(a), a copy of the Complaint and all process, pleadings, orders and other papers filed in this action and obtained by Aurora are attached as Exhibit "A."

6. The Court has diversity jurisdiction over this matter under 28 U.S.C. § 1332 because (1) the amount in controversy exceeds \$75,000.00, exclusive of costs and interest, and (2) there is diversity of citizenship between the Plaintiff and Aurora.

7. It is apparent that the amount in controversy requirement is met because the Plaintiff explicitly states that she seeks punitive damages in Paragraph 11 of the Complaint. *See* Exhibit "A." As this Court has previously explained, "federal courts in Mississippi have consistently held that a claim for an unspecified amount of punitive damages under Mississippi law is deemed to exceed the amount necessary for federal jurisdiction." *Brasell v. Unumprovident Corp.*, No. 2:01-cv202, 2002 WL 1530342 at * 2 (N.D. Miss. Oct. 25, 2001), citing, *inter alia, St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 150, 1253 (5th Cir. 1998).

8. Diversity of citizenship exists because the Plaintiff is alleged to be a citizen of Mississippi, *see* Complaint at ¶ 1, and Aurora is not a citizen of Mississippi. As set forth in detail below, Aurora Australis, LLC, is a Tennessee limited liability company whose sole member, Vanguard Healthcare, LLC, is a citizen of the state of Tennessee. No members of Vanguard

Healthcare, LLC, reside in or are citizens of the state of Mississippi. Aurora is therefore not a citizen of Mississippi. *See Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) (holding that the citizenship of an LLC is that of all its members).

9. Again, Aurora's sole member is Vanguard Healthcare, LLC, a Tennessee citizen. And Vanguard Healthcare's members are William D. Orand, Sr., the Orand Limited Partnership, and the Ervin General Partnership.

10. William D. Orand, Sr. is a citizen of Tennessee.

11. The Orand Limited Partnership is a Tennessee limited partnership. Its partners are William D. Orand, Sr.; Pam Orand; William D. Orand, Jr.; and Bradford Orand. William D. Orand, Sr.; Pam Orand, and Bradford Orand are all citizens of Tennessee. William D. Orand, Jr. is a citizen of Texas. Thus, the Orand Limited Partnership is a citizen of Tennessee and of Texas. *Int'l Paper Co. v. Denkmann Assocs.*, 116 F.3d 134, 137 (5th Cir. 1997) ("For the purposes of diversity jurisdiction, the citizenship of a partnership is determined by reference to the citizenship of each of its partners.")

12. The Ervin General Partnership is a Tennessee limited partnership. Its partners are Linda M. Ervin; the Jere Suzanne Smothers Irrevocable Trust; the William J. Ervin Irrevocable Trust; the Jere Murphy Smothers 2008 Irrevocable Trust; and the Thomas Mann Smothers 2008 Irrevocable Trust. Linda M. Ervin is a citizen of Tennessee. Because J. Larry Williams is the trustee for each and every one of the aforementioned trusts, and further because he is a citizen of Tennessee, the trusts are Tennessee citizens. *See Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 397 n. 6 (5th Cir. 2009), citing *Navarro Savs. Ass'n v. Lee*, 446 U.S. 458, 464 (1980) (holding that the citizenship of a trust is that of its trustee). Thus, because all of its members are Tennessee citizens, the Ervin General Partnership is a Tennessee citizen. *See Int'l Paper Co.*, 116 F.3d at 137.

13. The Plaintiff has named John & Jane Does 1-30 as additional defendants. For removal purposes, however, the citizenship of a defendant sued under a fictitious name is not considered. *Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 475 (5th Cir. 2001) (quoting 28 U.S.C. § 1441(a) which states, "For purposes of removal, . . . the citizenship of defendants sued under fictitious names shall be disregarded.").

14. For the reasons stated above, this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332, and removal is proper under §§ 1441 and 1446.

15. In accordance with 28 U.S.C. § 1446(d), the Lowndes County Circuit Court and Plaintiff's counsel have been given written notice of the filing of this Notice of Removal. *See* Exhibit "B."

WHEREFORE, Aurora requests that the above-captioned action now pending in Lowndes County Circuit Court be removed to the United States District Court for the Northern District of Mississippi, Eastern Division, and that the District Court assume jurisdiction over this lawsuit.

This the 29th day of August, 2012.

Respectfully Submitted,

AURORA AUSTRALIS, LLC d/b/a
AURORA HEALTH & REHABILITATION

By their Attorneys,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

By: Alicia S. Hall
ALICIA S. HALL

W. Davis Frye (MB# 10671)
Alicia S. Hall (MB# 103580)
BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ, PC
4268 I-55 North
Meadowbrook Office Park
Jackson, MS 39211
Phone: (601) 351-2400
Fax: (601) 351-2424

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be delivered by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Notice of Removal* to the following:

Monique Brooks Montgomery
The Montgomery Law Firm, LLC
814 2nd Avenue North
Columbus, MS 39701

This the 27 day of August, 2012.


ALICIA S. HALL

No. 2012-0111-CV1

CFN 20839

ESTATE OF ELLA M. FULTON..., ET AL.
VS.

Counsel for Plaintiff
Monique Brooks Montgomery
Counsel for Defendant

AURORA HEALTH & REHABILITATION..., ET AL
NEGLIGENCE-GENERAL

JUDGE Lee Sorrels Coleman

===== DATE ORDERS, JUDGMENTS, ETC. =====

7/16/12 Complaint, filed.
7/16/12 Request for Process, filed.
7/16/12 Aurora Health & Rehabilitation... - Summons issued
and delivered to plaintiff attorney for service.
7/24/12 Letter From office of Baker Donelson requesting copy of the
Complaint along with required fee, filed. Same mailed this
date.
8/16/12 Process Server Summons Returned executed by personal service
on Aurora Health & Rehabilitation by serving Jackie Johnson,
Office Manager, OTHER THAN NAMED PROCESS AGENT, on 8-2-12
By: Sonny Sanders, Process Server, filed.**ENTER CD W/EXCEPT**

| | | | | | | | |
|--|--|---|---|--|--|---|--------------|
| COVER SHEET | | Court Identification Docket # | | Case Year | | Docket Number | |
| Civil Case Filing Form <i>(To be completed by Attorney/Party Prior to Filing of Pleading)</i> | | <input type="text" value="44"/> County # <input type="text"/> Judicial District <input type="text" value="CT"/> Court ID <input type="text" value="071612"/> Month Date Year | <input type="text" value="2012"/> Case Year | | <input type="text" value="D111"/> Docket Number <input type="text" value="CV1C"/> Local Docket ID | | |
| Mississippi Supreme Court Form AOC/011 Administrative Office of Courts (Rev 2009) | | This area to be completed by clerk | | Case Number if filed prior to 1/1/94 | | | |
| In the CIRCUIT | | Court of LOWNDES | | County - — | | Judicial District | |
| Origin of Suit (Place an "X" in one box only) | | | | | | | |
| <input checked="" type="checkbox"/> Initial Filing <input type="checkbox"/> Reinstated <input type="checkbox"/> Remanded <input type="checkbox"/> Reopened <input type="checkbox"/> Foreign Judgment Enrolled <input type="checkbox"/> Joining Suit/Action <input type="checkbox"/> Transfer from Other court <input type="checkbox"/> Appeal <input type="checkbox"/> Other | | | | | | | |
| Plaintiff - Party(ies) Initially Bringing Suit Should Be Entered First - Enter Additional Plaintiffs on Separate Form | | | | | | | |
| Individual <u>FULTON</u> <u>LEON</u> | | | | | | | |
| Last Name | | First Name | | Maiden Name, if applicable | | M.I. | Jr/Sr/Ill/IV |
| <input type="checkbox"/> Check (x) if Individual Plaintiff is acting in capacity as Executor(trix) or Administrator(trix) of an Estate, and enter style: Estate of <u>ELLA M. FULTON (D) and her heirs</u> | | | | | | | |
| <input type="checkbox"/> Check (x) if Individual Plaintiff is acting in capacity as Business Owner/Operator (d/b/a) or State Agency, and enter entity D/B/A or Agency | | | | | | | |
| Business _____ Enter legal name of business, corporation, partnership, agency - If Corporation, indicate the state where incorporated <input type="checkbox"/> Check (x) if Business Plaintiff is filing suit in the name of an entity other than the above, and enter below: D/B/A | | | | | | | |
| Address of Plaintiff <u>2311 WASHINGTON AVENUE, COLUMBUS, MS 39701</u> | | | | | | | |
| Attorney (Name & Address) <u>Monique Brooks Montgomery 814 2nd Avenue North, Columbus, MS 39701</u> | | | | | | MS Bar No. <u>10720</u> | |
| <input type="checkbox"/> Check (x) if Individual Filing Initial Pleading is NOT an attorney Signature of Individual Filing: <u>Monique Brooks Montgomery</u> | | | | | | | |
| Defendant - Name of Defendant - Enter Additional Defendants on Separate Form | | | | | | | |
| Individual _____ | | | | | | | |
| Last Name | | First Name | | Maiden Name, if applicable | | M.I. | Jr/Sr/Ill/IV |
| <input type="checkbox"/> Check (x) if Individual Defendant is acting in capacity as Executor(trix) or Administrator(trix) of an Estate, and enter style: Estate of _____ | | | | | | | |
| <input type="checkbox"/> Check (x) if Individual Defendant is acting in capacity as Business Owner/Operator (d/b/a) or State Agency, and enter entity D/B/A or Agency | | | | | | | |
| Business <u>AURORA HEALTH and REHABILITATION (f/k/a Aurora Australis Lodge, LLC)-Incorporated in MS</u> Enter legal name of business, corporation, partnership, agency - If Corporation, indicate the state where incorporated <input type="checkbox"/> Check (x) if Business Defendant is acting in the name of an entity other than the above, and enter below: D/B/A | | | | | | | |
| Attorney (Name & Address) - If Known _____ MS Bar No. _____ | | | | | | | |
| Damages Sought: | | Compensatory \$ _____ | | Punitive \$ _____ | | Check (x) if child support is contemplated as an issue in this suit. * | |
| <small>*If checked, please submit completed Child Support Information Sheet with this Cover Sheet</small> | | | | | | | |
| Nature of Suit (Place an "X" in one box only) | | | | | | | |
| Domestic Relations | | Business/Commercial | | Children/Minors - Non-Domestic | | Real Property | |
| <input type="checkbox"/> Child Custody/Visitation <input type="checkbox"/> Child Support <input type="checkbox"/> Contempt <input type="checkbox"/> Divorce:Fault <input type="checkbox"/> Divorce: Irreconcilable Diff. <input type="checkbox"/> Domestic Abuse <input type="checkbox"/> Emancipation <input type="checkbox"/> Modification <input type="checkbox"/> Paternity <input type="checkbox"/> Property Division <input type="checkbox"/> Separate Maintenance <input type="checkbox"/> Termination of Parental Rights <input type="checkbox"/> UIFSA (eff 7/1/97; formerly URESA) <input type="checkbox"/> Other _____ | | <input type="checkbox"/> Accounting (Business) <input type="checkbox"/> Business Dissolution <input type="checkbox"/> Debt Collection <input type="checkbox"/> Employment <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Garnishment <input type="checkbox"/> Replevin <input type="checkbox"/> Other _____ | | <input type="checkbox"/> Adoption - Contested <input type="checkbox"/> Adoption - Uncontested <input type="checkbox"/> Consent to Abortion Minor <input type="checkbox"/> Removal of Minority <input type="checkbox"/> Other _____ | | <input type="checkbox"/> Adverse Possession <input type="checkbox"/> Ejectment <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Eviction <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Lien Assertion <input type="checkbox"/> Partition <input type="checkbox"/> Tax Sale: Confirm/Cancel <input type="checkbox"/> Title Boundary or Easement <input type="checkbox"/> Other _____ | |
| Appeals | | Probate | | Civil Rights | | Torts | |
| <input type="checkbox"/> Administrative Agency <input type="checkbox"/> County Court <input type="checkbox"/> Hardship Petition (Driver License) <input type="checkbox"/> Justice Court <input type="checkbox"/> MS Dept Employment Security <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other _____ | | <input type="checkbox"/> Accounting (Probate) <input type="checkbox"/> Birth Certificate Correction <input type="checkbox"/> Commitment <input type="checkbox"/> Conservatorship <input type="checkbox"/> Guardianship <input type="checkbox"/> Heirship <input type="checkbox"/> Intestate Estate <input type="checkbox"/> Minor's Settlement <input type="checkbox"/> Muniment of Title <input type="checkbox"/> Name Change <input type="checkbox"/> Testate Estate <input type="checkbox"/> Will Contest <input type="checkbox"/> Other _____ | | <input type="checkbox"/> Elections <input type="checkbox"/> Expungement <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Post Conviction Relief/Prisoner <input type="checkbox"/> Other _____ | | <input type="checkbox"/> Bad Faith <input type="checkbox"/> Fraud <input type="checkbox"/> Loss of Consortium <input type="checkbox"/> Malpractice - Legal <input type="checkbox"/> Malpractice - Medical <input type="checkbox"/> Mass Tort <input checked="" type="checkbox"/> Negligence - General <input type="checkbox"/> Negligence - Motor Vehicle <input type="checkbox"/> Product Liability <input type="checkbox"/> Subrogation <input type="checkbox"/> Wrongful Death <input type="checkbox"/> Other _____ | |
| Statutes/Rules | | | | | | | |
| <input type="checkbox"/> Bond Validation <input type="checkbox"/> Civil Forfeiture <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Injunction or Restraining Order <input type="checkbox"/> Other _____ | | | | | | | |

**IN THE CIRCUIT COURT OF LOWNDES COUNTY
STATE OF MISSISSIPPI**

ESTATE OF ELLA M. FULTON, Deceased
by and through LEON FULTON, Individually
and as the Administrator of the ESTATE OF ELLA
M. FULTON, for the use and benefit of the Heirs

PLAINTIFF

V.

CIVIL ACTION NO. 2012-0111-CV1C

AURORA HEALTH & REHABILITATION
(f/k/a Aurora Australis Lodge, LLC)
and JOHN DOES 1-5

DEFENDANTS

NOTICE OF FILING OF NOTICE OF REMOVAL

Defendant Aurora Health & Rehabilitation ("Defendant") hereby gives notice to the Circuit Court of Lowndes County, Mississippi, that Defendant filed a Notice of Removal with the United States District Court for the Northern District of Mississippi, Eastern Division, and that this case has been removed to that court. A true and correct copy of the Notice of Removal is attached as Exhibit "A."

The Circuit Court of Lowndes County, Mississippi, is respectfully requested to proceed no further in this action unless the action is remanded by order of the United States District Court for the Northern District of Mississippi.

This 29th day of August, 2012.

Respectfully submitted,

AURORA HEALTH &
REHABILITATION

By Its Attorneys,

BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, PC

By: Alicia S. Hall
ALICIA S. HALL



W. Davis Frye (MB# 10671)
Alicia S. Hall (MB# 103580)
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4268 I-55 North
Meadowbrook Office Park (39211)
P.O. Box 14167
Jackson, Ms 39236
Phone: (601) 351-2400
Fax: (601) 351-2424

CERTIFICATE OF SERVICE

I hereby certify that I have mailed the foregoing *Notice of Filing Notice of Removal* via U.S. mail, postage prepaid, to the following:

Monique Brooks Montgomery
The Montgomery Law Firm, L.L.C.
814 2nd Avenue North
Columbus, MS 39701

This 29th day of August, 2012.


ALICIA S. HALL